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In The

Supreme Court of the United States

October Term, 1990

EMOGENE WILLIAMS COBIN; BONNIE WILLIAMS GILBERT; CAROLINE WILLIAMS GILES; BARBARA WILLIAMS GUINN; VERNA WILLIAMS HAMMOND; DONNA WILLIAMS LOCKHART; ERNESTINE WILLIAMS WEBB; DELAVAH WILLIAMS; JOHNIE WILLIAMS; RICKY WILLIAMS; RONNIE WILLIAMS; SHARON WILLIAMS,
Petitioners,

v.

JAMES T. CASTLEBERRY AND JOCILE C. PERRY, CO-EXECUTORS OF THE ESTATE OF JOE L. CASTLEBERRY, DECEASED; FAULKNER COUNTY, ARKANSAS, AND JOE MARTIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131
Attorney for Petitioners

July 23, 1991

QUESTION PRESENTED FOR REVIEW

Whether the respondents' justification for peremptorily striking all black jurors in a civil rights case was facially pretextual and not a "neutral explanation" and therefore discriminatory under *Batson v. Kentucky* and *Texas Dept. of Community Affairs v. Burbine*.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on April 24, 1991. It is unpublished.

JURISDICTION

The Court of Appeals decided this case on April 24, 1991. This Petition for Writ of Certiorari is filed within ninety days and is, therefore, timely.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

STATEMENT OF THE CASE

This case presents a *Batson* challenge in a civil rights case brought under 42 U.S.C. § 1983 and an issue not addressed in *Batson:* What is a facially pretextual explanation in the face of a *prima facie* case of race discrimination in jury selection?

A.

This is the final chapter in the civil rights case which arose in 1984 from the May 6, 1960 death of Marvin Williams, a black man, in the Faulkner County, Arkansas jail. The complaint alleged that petitioners' decedent was killed at the hands of white police officers after he was placed in the Faulkner County jail, allegedly for being intoxicated in

public. The complaint alleged a cover-up of the true cause of the death for 24 years until a witness came forward who was alleged to have been intimidated into silence back in 1960 by some of the defendants. The allegations of fact are stated in much more detail in a prior appeal on statute of limitations and immunity grounds which dismissed some of the original defendants. *Williams v. Hartje*, 827 F.2d 1203, 1204-05 (8th Cir.1987).[1] The respondents remained parties.

As to the respondents, it is alleged that, as jailers, they took custody of decedent and that they either participated in the beating of decedent or were aware of it and did nothing to get decedent medical care when it was obvious he was seriously injured. This was alleged to be the cause of his death.

B.

This case was finally tried to a jury on July 20-26, 1988. During jury selection, defense counsel exercised peremptory challenges to exclude two black venirepersons, James Fountain and Viola Sebastian. Originally, there were 21 persons on the panel. Only three of these were black. The third black juror was excused for cause because of an opinion developed from press accounts of the

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[1] There were also indictments of two of the dismissed defendants. *See Iberg v. Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985), and *Mullenax v. Langston*, 286 Ark. 470, 692 S.W. 2d 755 (1985), both denying writs of prohibition on grounds that there was no statute of limitations for first degree murder in 1960. Both were acquitted after a four week trial.

case.[2] As a result of the peremptory challenges and this excusal for cause, this case was tried to an all-white jury.

Petitioners timely objected to the exercise of the peremptory challenges on equal protection grounds. The district court considered the issue first before continuing with the trial. The court held that *Batson v. Kentucky*, 476 U.S. 79 (1986), applied, and the petitioners established a *prima facie* case of discrimination on equal protection grounds. The burden then shifted to the respondents to articulate a racially neutral explanation for the peremptory challenges. Respondents' counsel explained that they excused Ms. Sebastian because they did not believe that she had the intelligence to understand the technical medical testimony that was forthcoming. They stated that they excused Mr. Fountain because he was "squirley" and because he was a psychology teacher and had previously sued his employer. The district court held that these reasons were sufficient to rebut the *prima facie* case of discrimination established by petitioners.

The case proceeded to trial, and after five days of testimony, the jury returned a verdict on interrogatories for respondents. Petitioners filed a motion for a new trial on the jury selection issue because of a pending Eighth Circuit case. The district court held the matter under advisement until the other case was decided. It then reaffirmed its

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[2] Several white jurors were also stricken for the same reason. In all, thirteen of the prospective jurors had heard news accounts of the death of Marvin Williams and the cases surrounding it. Both Mr. Fountain and Ms. Sebastian had heard of it, and both said that they had formed no opinion about the case.

pretrial decision that the respondents articulated a neutral justification for the exercise of the peremptory challenges and denied the motion for a new trial in an unpublished decision. *Williams v. Faulkner County*, LR-C-84-791 (E.D.Ark., June 27, 1990).

The petitioners appealed. The Eighth Circuit affirmed on April 24, 1991 in a two paragraph unpublished *per curiam* that the district court's findings had support in the record. *Cobin v. Castleberry*, 90-2276 (8th Cir., April 24, 1991).

C.

The reasons given for excusing the black jurors in that case underscores petitioners' *prima facie* case: Sebastian was stricken because respondents believed that she was too dumb to fathom the medical testimony, yet respondents never asked her a question in voir dire. In fact, *no* juror was asked any questions which would have revealed anything about their ability to understand medical testimony. How respondents could devine this from her questioning is utterly incredible and supports the claim of pretext.

On the other hand, the very reason given for excusing Ms. Sebastian would seem to have required respondents to keep Mr. Fountain. He was stricken, however, apparently because he was *too* educated. Aside from what respondents vaguely called his "squirliness," another reason given for his being struck was that he sued the University of Central Arkansas, his former employer, *three years ear-*

lier in state chancery court[3] and he was unemployed. Yet, the trial was in the summer, and he was between teaching positions and was about to start teaching at Tuskegee Institute in Alabama. (*See* T.55) Yet, a white juror, Hollingsworth, was also currently a party in a traffic accident case (*see* T.54), and she was not struck by the respondents.

Ms. Sebastian was questioned individually in chambers because jurors above her on the jury list had been stricken for cause, thereby necessitating her questioning. It went entirely as follows:

> THE COURT: . . . Ms. Sebastian, please take a seat. We have asked you to come in because during this recess we have had to excuse a couple of other jurors so we have called you and another gentlemen to replace them.
>
> Have you been listening to the statements and the questions of the court?
>
> MS. SEBASTIAN: Yes, I have.
>
> THE COURT: Would you have answered yes or felt called upon to say anything in connection with my previous statements or questions?
>
> MS. SEBASTIAN: No, I wouldn't.
>
> THE COURT: You don't know any of the parties or have any relationship to any of the parties to the lawsuit?
>
> MS. SEBASTIAN: No.

---

[3] Since the suit was filed in Chancery Court, it obviously had nothing to do with race discrimination. What the suit was about is not revealed by the record.

THE COURT: Where do you live?

MS. SEBASTIAN: Here in Little Rock.

THE COURT: And you have never lived in Faulkner County?

MS. SEBASTIAN: No.

THE COURT: Have you ever served on a jury in any other case?

MS. SEBASTIAN: No.

THE COURT: And you have never been involved in a lawsuit before yourself?

MS. SEBASTIAN: No.

THE COURT: Do you recall having read or heard anything about this case or seen any television or radio program?

MS. SEBASTIAN: I seen it on TV once.

THE COURT: And have you formed any opinion about the case or any of the issues in the case?

MS. SEBASTIAN: No, I haven't.

THE COURT: Can you put aside whatever you may have heard about this case before and try this case solely on the lawful evidence that is brought before you in the courtroom during the trial?

MS. SEBASTIAN: Yes.

THE COURT: Do you know of any reason why you couldn't serve as a fair and impartial juror in the trial of this case?

MS. SEBASTIAN: No.

THE COURT: All right. Mr. Hall?

MR. HALL [for petitioners]: No questions, Your Honor.

MR. ADKISSON [for Martin and the County]: No questions.

MR. HENRY [for the estate]: No questions, Your Honor.

(T. 72-73) (bracketed material added) Remarkably, her simple yes and no answers, much the same as the answers given by all of the white potential jurors, in the eyes of the respondents, disqualified her from jury duty in this case because she appeared too dumb for them.

Respondents gave the perfect answer to drain *Batson* of all meaning.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION OF WHAT IS A PRETEXTUAL "NEUTRAL EXPLANATION" FOR A PEREMPTORY CHALLENGE UNDER *BATSON v. KENTUCKY* AND WHETHER PETITIONER SHOWED PRETEXT.

This case presents a question unresolved in *Batson v. Kentucky*, 476 U.S. 79, 98 n.20 (1986), which should now be addressed: What are the various burdens when the victim of alleged racial discrimination in jury selection claims that the reason given for a peremptory challenge of a black juror is facially pretextual? In this case, the reasons respondents gave for striking the jurors were facially pretextual and, therefore, they did not carry their burden of rebutting petitioners' *prima facie* case of racial discrimination in the exercise of peremptory challenges.

Without this clarification, *Batson* will easily become a hallow promise; the discriminating party can never lose by giving a vague "neutral explanation" which proves the act of discrimination.

A.

In *Batson v. Kentucky, supra*, the Court held "the Equal Protection Clause forbids [the exclusion of] potential jurors solely on account of their race or on the assumption that black jurors as a group will" favor black litigants. *Id.* at 89. The Court outlined a three-step approach in considering a litigant's equal protection in jury selection claim: First, the plaintiffs must show that they are members of a cognizable racial group and that the defendants used peremptory challenges to remove from the venire members

of the plaintiffs' own race. *Id.* at 96. Second, plaintiffs may rely on the presumption that permit "those to discriminate who are of a mind to discriminate," in pointing to any other relevant circumstances from which an inference of purposeful discrimination may be drawn. *Id.* Third, once plaintiffs have made a *prima facie* showing of discrimination, the burden shifts to the party exercising the peremptory challenges to come forward with a racially neutral explanation for the strikes. *Id.*

Once the *prima facie* case of discrimination is shown, the defendants may not rebut it merely by affirming their "good faith in making individual selections," *id.* at 98, or relying on counsel's "assumption--or his intuitive judgment--that the [venireperson] would be partial to [the plaintiffs] because of their shared race." *Id.* at 97. The defendants are required to come forward with a "'clear and reasonably specific' explanation of [their] 'legitimate reasons' for exercising the challenges." *Id.* at 98 n.20, quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 258 (1981) (bracketed material added).

B.

The *Batson* Court gave no guidance on the pretext question other than this citation to *Burdine*. Justice MARSHALL addressed this gap in his concurring opinion in *Batson, supra,* at 105-06 (MARSHALL, J., concurring):

> [W]hen a defendant can establish a *prima facie* case, trial courts face the difficult burden of assessing prosecutors' motives. . . . A prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's

> statement that he struck a juror because the juror . . . seemed "uncommunicative," . . . or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," . . . ? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

C.

Petitioners clearly made their *prima facie* case: The only blacks on the panel were peremptorily stricken by respondents. The district court so found, and there can be no quarrel with that holding.

Respondents' asserted justification for these strikes, held by the district court, and affirmed by the court of appeals, to be a neutral explanation was, however, clearly pretextual under the theory espoused in *Burdine:* the proponent "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the [alleged discriminator] or indirectly by showing that the [alleged discriminator's] proffered explanation is unworthy of credence. See *McDonnell Douglas* [*Corp. v. Green*], 411 U.S. [792,] at 804-805 [(1973)]." *Burdine, supra,* at 258 (bracketed material added).

D.

This Court has gone to great lengths to affirm the promise of *Batson* in the last Term of the Court. It held in *Powers v. Ohio,* 111 S.Ct. 1364 (1991), that a peremptorily struck juror did not have to be of the same race as the criminally accused for *Batson* to apply. More impor-

tantly, the Court held in *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077 (1991), that *Batson* applies to civil cases.

The *Burdine* Court felt that it would not be difficult for an alleged victim of race discrimination to prove pretext. Thus far under *Batson*, as Justice Marshall predicted, it is well nigh impossible to show pretext.[4]

Guidance from this Court is now necessary lest *Batson* become an empty promise.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131
Attorney for Petitioners

July 23, 1991

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[4] Petitioners' research has shown that few, if any, *Batson*-type cases result in reversal for pretext because courts virtually uniformly accept the proffered justification as being a "neutral explanation." One case substantially similar to this case holding that justifications given which were similar to the ones proffered here were constitutionally inadequate: *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir.1989), can fairly be stated to be at odds with the decision below.

APPENDIX

Williams v. Faulkner County, Arkansas,
LR-C-84-791 (E.D.Ark., June 27, 1990) A1

Cobin v. Castleberry, 90-2276 (8th Cir.,
(April 24, 1991) A12

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
JUN 27 1990
CARL BRENTS, CLERK

RICKY WILLIAMS; SHARON WILLIAMS; BONNIE WILLIAMS GILBERT; DELAVAH WILLIAMS; JOHNNIE WILLIAMS; RONNIE [WILLIAMS]; EARNESTINE WILLIAMS WEBB; CAROLINE WILLIAMS GILES; VERNA WILLIAMS HAMMOND; BARBARA WILLIAMS GUINN; and DONNA WILLIAMS LOCKHART, The Survivors of MARVIN WILLIAMS — Plaintiffs

v. Civil No. LR-C-84-791

FAULKNER COUNTY, ARKANSAS; JAMES T. CASTLEBERRY AND JOCILE C. PERRY, Co-executors of the Estate of JOE L. CASTLEBERRY, Deceased; and JOE MARTIN — Defendants

MEMORANDUM AND ORDER

Pending before the Court is the plaintiff's motion for a new trial. For the reasons stated below, the motion will be denied.

On May 6, 1960, Mr. Marvin Williams, a black man, died while in police custody at the Faulkner County Jail in Conway, Arkansas. The plaintiffs allege that the individual defendants, a former Faulkner County sheriff and his

deputy, were responsible for the wrongful death of Mr. Williams and deprived him of his civil rights in violation of 42 U.S.C. §§ 1981, 1983 and 1985. After a seven-day trial, the jury returned a verdict in favor of the defendants. The plaintiffs contend that a new trial should be granted because the defendants discriminated against black members of the venire during the jury selection process in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

The defendants used two of their three peremptory challenges to exclude James Fountain and Veola Sebastian, the only two black persons on the venire. After the jury was seated, the plaintiffs moved for a mistrial contending that the strikes were racially motivated. After debating whether *Batson* applied to civil cases, defense counsel volunteered their reasons for striking the two potential jurors. The Court found those reasons racially neutral, and therefore denied plaintiff's motion. The trial then proceeded before an all-white jury.

Plaintiffs now renew their contention that the exclusion of the two potential jurors was discriminatory. Plaintiffs also contend that the explanations given by the defendants for their strikes failed to adequately rebut the inference of racial discrimination as required by *Batson* and several cases interpreting it within this Circuit. Specifically, the plaintiffs argue that the defendants' explanation for excluding Ms. Sebastian failed to meet the comparability standard for articulating racially-neutral justifications for the use of peremptories that had been set forth in *United States v. Wilson*, 853 F.2d 606 (8th Cir. 1988). This Court stayed ruling on the present motion after Wilson had been vacated for reconsideration *en banc*, *Id.*, 861 F.2d 514. *Wilson* now having been decided, *Id.*, 884 F.2d 1121

(8th Cir. 1989) (*en banc*), the Court will now rule on the motion.

I.

The defendants first respond that *Batson* applies only in criminal cases. Since the filing of this motion, the Eighth Circuit rejected a similar argument and held that Batson does apply in civil cases in federal court, at least where the discriminatory use of peremptories may be attributed to a state actor.

In *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1009 (8th Cir. 1990) the court reversed a district court's ruling that a municipal defendant in a § 1983 case need not explain its peremptory challenges against black jurors. Rejecting the city's claim that *Batson* applied only in criminal cases, the Court of Appeals reasoned that the Supreme Court's explicit choice to go beyond Sixth Amendment analysis and rest its holding upon the Equal Protection Clause of the Fourteenth Amendment, implicitly extended *Batson*'s reach to civil cases at least where the state is a party and can be tied to the discriminatory use of peremptories. *Id.*, at 1008.

> The distinction that is crucial for application of equal-protection principles is that between governmental actors and private actors. The distinction explains the Court's reasoning in *Batson* far better than the differences between criminal and civil cases. The *Batson* Court specifically declined to formulate any limit on the exercise of peremptory challenges by defense counsel. If the City's rationale were correct that

> *Batson*'s applicability depends on the type of case, rather than the governmental affiliation of the party exercising peremptory challenges, then criminal defense counsel would confront the same limits on their peremptory challenges as prosecutors. The more natural reading of *Batson* is that its rule of non-discrimination applies only to governmental actors, without distinguishing criminal and civil legal proceedings.
>
> We conclude that the actions of government counsel in purposefully removing black jurors through peremptory challenges violates the Equal Protection Clause, whether the exclusion occurs in a criminal or a civil case.

Id. (citations omitted).

Of course, the Equal Protection Clause limits state but not private action, and the Eighth Circuit left open the question whether *Batson* would apply where peremptory challenges are exercised by non-governmental litigants. *Id.*, n. 2. The rationale of the distinction drawn above concerning criminal defense counsel suggests that *Batson* should not apply where a private litigant is charged with making discriminatory strikes.[1]

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[1] At least one commentator has so concluded because use of peremptories by criminal defense counsel cannot not be characterized as state action. Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry And The Jury In A Criminal Trial*, 102 Harv. L. Rev. 808 (1989). An analogous conclusion could be

In *Edmonson v. Leesville Construction Co., Inc.*, 895 F.2d 218 (5th Cir. 1990) (*en banc*), the Court held that a private litigant in a federal civil case, who peremptorily challenged a venire member of the same race as his opponent, is under no obligation to rebut the inference that he struck the juror because of race. The Court concluded that subjecting the use of peremptories to equal protection analysis was inappropriate in such a case because the alleged discriminatory conduct could not be attributed to a state actor. Therefore, the discriminatory conduct fell outside the protection of the Fourteenth Amendment and the holding in *Batson*. *Id.*, 895 F.2d at 221-22.

In so ruling, the Fifth Circuit rejected an earlier panel opinion that found state action through the judicial oversight and administration of peremptory challenges. *Edmonson v. Leesville Construction Co., Inc.*, 860 F.2d 1308, 1312 (5th Cir. 1988), *vacated by order granting rehearing en banc*, 860 F.2d 1317 (5th Cir. 1989) ("The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Ms. X, you are excused.'" *Id.*, 860 F.2d at 1313). The ruling also conflicts with the decision in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.), *cert. denied*, 110 S.Ct. 201 (1989), where the Eleventh Circuit upheld a plaintiff's argument that "a district court denies a black litigant equal protection of the laws whenever it permits his adversary--*whether the government or a private party*--to use a peremptory challenge" to exclude persons who are the litigant's "racial peers." *Id.*, at 824 (emphasis

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drawn for a private litigant's counsel in a civil case.

added).

Here, the plaintiffs sued both private individuals and the County, which would undoubtably qualify as a state actor. The attorney for Faulkner County also represented separate defendant Joe Martin, and likely exercised joint responsibility for the strikes. Under those circumstances, state action would be apparent and *Batson* would apply because despite counsel's dual role as attorney for a government entity and a private litigant, the County "cannot exempt itself from the Equal Protection Clause simply because its counsel also represented individuals." *Reynolds v. City of Little Rock, supra*, 893 F.2d at 1009.

On the other hand, the record of the hearing on the motion for mistrial reveals that the reasons for the strikes were offered by counsel for the co-executors of the estate of Mr. Castleberry. Counsel for the Castleberry estate also appeared to take responsibility for the strikes against the two black jurors. If the challenges had been exercised exclusively by the Castleberry estate, then, (assuming the Eighth Circuit were to hold that judicial oversight of the administration of peremptory challenges to be insufficient to constitute governmental action) it would follow that *Batson* could not apply in this case--not because of the type of case--but because of the absence of a link between the alleged discriminatory conduct and a party who "may be appropriately characterized as a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 475 U.S. 922, 937 (1982). However, the Court need not reach this question because even assuming *Batson* does apply, the striking of two black venirepersons by the defendants in this case did not deprive plaintiffs of equal protection.

II.

In *Batson*, the Supreme Court held that "the Equal Protection Clause forbids [the exclusion of] potential jurors solely on account of their race or on the assumption that black jurors as a group will" favor black litigants. *Id.*, 476 U.S. at 89. The Court outlined a three-step approach in considering a litigant's equal protection claim: First, plaintiffs must show they are members of a cognizable racial group and that the defendants used peremptory challenges to remove from the venire members of the plaintiffs' own race. *Id.*, 476 U.S. at 96. Second, plaintiffs may rely upon a presumption that peremptory challenges permit "those to discriminate who are of a mind to discriminate," in pointing to any other relevant circumstances from which an inference of purposeful discrimination may be drawn. *Id.* Third, once plaintiffs have made a *prima facie* showing of discrimination, the burden shifts to the party exercising the peremptory challenges to come forward with a racially neutral explanation for the strikes. *Id.*

Plaintiffs here have clearly met the first requirement. As for the second, it must be noted that the gravamen of the complaint is that defendants Martin and Castleberry beat Marvin Williams to death while he was in their custody in the Faulkner County jail. The defendants were white. Mr. Williams was black. Of particular relevance was the racial climate of the times. Therefore, defendants' strikes against the only two black venirepersons created an inference of purposeful discrimination sufficient to require an explanation for the challenges.

The defendants may not rebut a *prima facie* case of

discrimination by affirming their "good faith in making individual selections", *Id.*, 476 U.S. at 98, or relying on counsel's "assumption--or his intuitive judgment--that [the venireperson] would be partial to [the plaintiffs] because of their shared race." *Id.*, at 97. The defendants must give a "'clear and reasonably specific' explanation of [their] 'legitimate reasons' for exercising the challenges." *Id.*, at 98 n. 20 (citations omitted). The plaintiffs may then attempt to demonstrated that the proffered reasons are pretextual. *United States v. Wilson*, 816 F.2d 421, 423 (8th Cir. 1987).

Responding to the motion for mistrial, the defendants volunteered to offer their reasons for striking the jurors without conceding that *Batson* required them to do so. Counsel explained first that Mr. Fountain possessed characteristics that "create[d] a picture of instability." They noted that despite having a Master's degree in psychology and past employment as a college professor and minister, Mr. Fountain had been unemployed for some time and had been a plaintiff in a suit against his former employer. Plaintiffs do not seriously contest the legitimacy of this explanation, and the Court accepts the bona fides of such an explanation and concludes that Mr. Fountain was struck for racially neutral reasons. However, plaintiffs contend that the defendants failed to offer an adequate reason for the use of a peremptory challenge to strike Ms. Veola Sebastian. It is necessary to probe the factual circumstances surrounding the exclusion of this juror.

The plaintiffs' lawsuit, as well as a related criminal investigation, generated substantial media attention prior to trial. During voir dire, the Court asked whether any of the members of the venire had read or seen news accounts

about the case. Eighteen of the first twenty-three members of the venire said they had-- including Ms. Sebastian. The Court thereafter questioned each of these people individually in chambers to determine whether each such juror's exposure to the media's coverage of the case would prejudice that juror for or against either party.

Ms. Sebastian responded to the Court's questioning in a noticeably slow and tentative manner. The record revealed that she was employed as a factory worker, and her demeanor during voir dire suggested a poor educational background. The trial was expected to last several days, and would include a good deal of testimony and documentary evidence of a forensic pathologist and neurosurgeon. Responding to plaintiffs motion for mistrial, defense counsel cited these factors as their reasons for excluding Ms. Sebastian. Finally, the defendants offered to withdraw this strike, but the Court and plaintiffs rejected this offer concluding that replacing members of a jury that had already been seated might have created other concerns for prejudice.

Plaintiffs state that the proffered reason for excluding Ms. Sebastian was pretextual. Relying on the panel decision in *United States v. Wilson, supra*, plaintiffs contend that the defendants' explanation was inadequate because they did not demonstrate that they applied comparable assessments to white jurors, who were left on the jury. In *Wilson*, the panel concluded that the government could not rebut a *prima facie* case of discrimination if the proffered "reasons for the strikes either apply to both blacks struck and whites not struck, or cannot even be examined to determine comparability." *Id.*, 853 F.2d at 611. Thus, in the present case, plaintiffs argue that the defendants' expla-

nation that they struck Ms. Sebastian because she did not appear capable of following much of the testimony was subjective, perhaps applicable to other members of the venire, and therefore inadequate to rebut the inference of discriminatory intent.

It is unclear how much of this comparability test remains. Upon hearing *en banc*, the Eighth Circuit explicitly chose not to address the government's explanation for five of the six strikes and focused on a sixth in which comparability was not clearly an issue. *United States v. Wilson, supra*, 884 F.2d at 1122. The government explained it had information that the defendant, a prominent black attorney, would attempt to contact jurors and, the government reasoned, would more likely approach a black juror who resided in the same town as the defendant than white jurors who also lived in the same town. *Id.*, 1122-23. The Court concluded that this explanation constituted "a stereotypical racial reason for striking the potential black jurors. . . ." *Id.*, at 1124. In short, the Court held, the explanation demonstrated that the strike was used because of the juror's racial affiliation, and therefore violated *Batson*.

Unlike *Wilson*, the explanation offered by the defendants for striking Ms. Sebastian does not depend on her racial affiliation. If through voir dire, or otherwise, it develops that a particular juror is deficient in the intelligence needed to understand some aspect of the case, then that circumstance will provide an adequate basis for exercise of a peremptory challenge under *Batson*. Such assessments are indeed subjective. Yet it is the very essence of the peremptory challenge to allow an attorney to "act on only limited information or hunch" exercising his "intuitive

judgment" that a particular juror would be unfit for the case to be tried. *Batson*, 476 U.S. at 123 (Burger, C. J. dissenting). *Batson* modifies the breadth of an attorney's discretion to strike jurors by foreclosing as a possible reason for such strikes the intuitive judgment that a potential juror will favor his client's adversary because of shared racial or ethnic affiliation. *Batson* does not prohibit subjective assessments of a juror's qualifications when such assessments are based on qualities other than race.

Ultimately, this Court's obligation to determine whether peremptories were exercised for the purpose of intentional discrimination requires a finding of fact. *Batson*, 476 U.S. at 98 n. 21. Having conducted the *voir dire* in chambers, on a one-to-one basis, and having had the opportunity to closely observe the demeanor of the jurors, the Court finds that the defendants' proffered explanation was clear and specific and entirely credible. Moreover, it is clear to the Court that none of the other white venirepersons who performed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes. In sum, the Court does not find intentional discrimination in the defendants' exercise of peremptory challenges.

IT IS, THEREFORE ORDERED that the motion for new trial be, and it is hereby denied.

Dated this 27th day of June, 1990.

Signed: Garnett Thomas Eisele, United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2276

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams,	*	Appeal from the United States District Court for the Eastern District of Arkansas. [UNPUBLISHED]
Appellants,	*	
v.	*	
James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased,	*	
Appellees.	*	

Submitted: March 11, 1991

Filed: April 24, 1991

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

The plaintiffs filed this civil rights action under 42 U.S.C. § 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, an African-American who died in a jail in Faulkner County, Arkansas in 1960. They appeal the district court order denying their motion for a new trial following a jury verdict for the defendants, Faulkner County and two former sheriff's department employees. The plaintiffs contend that defense counsel exercised two of four peremptory challenges against African-American venirepersons in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny.

We have carefully examined the record and are unable to reverse. The district court's findings that defense counsel exercised their strikes according to neutral criteria, and not for racially discriminatory purposes, contains adequate support in the record. Inasmuch as these supported factual findings from the basis of the district court's judgment, we affirm. *See* 8th Cir. R. 47B.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.